(8)

No. 96-454

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

ASSOCIATES COMMERCIAL CORPORATION,
Petitioner,

v.

ELRAY RASH and JEAN E. RASH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether, when a debtor proposes to retain a secured creditor's collateral under the cramdown powers of chapter 13 of the Bankruptcy Code, the amount required to be paid on account of the creditor's secured claim is limited to the value that the secured creditor could have obtained if it had sold the collateral at foreclosure.

LIST OF PARTIES AND RULE 29.6 STATEMENT

There are none other than the named parties herein. Petitioner is an 80%-owned subsidiary of Ford Motor Corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit sitting *en banc* is reported at 90 F.3d 1036. The original panel opinion of the Fifth Circuit is reported at 31 F.3d 325. The panel's modified opinion is reported at 62 F.3d 685. The opinion of the United States District Court for the Eastern District of Texas has not been reported; it is included in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at 83a-88a. The opinion of the United States Bankruptcy Court for the Eastern District of Texas is reported at 149 B.R. 430.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The judgment of the court of appeals was

entered on July 30, 1996. The petition for a writ of certiorari was docketed on September 24, 1996, and granted on January 17, 1997.

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 1325 provides as follows: [1]

§ 1325. Confirmation of Plan

(a) Except as provided in subsection (b), the court shall confirm a plan if—

* * * *

(5) with respect to each allowed secured claim provided for by the plan—

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder. . . .[2]

11 U.S.C. § 506 provides as follows:

§ 506. Determination of Secured Status

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest,

[1] All statutory citations are to the Bankruptcy Code (11 U.S.C.), unless otherwise indicated. The numbering of sections in the Bankruptcy Code is the same as the numbering in Title 11 of the United States Code.

[2] The chapter 12 provision, § 1225(a)(5), is essentially identical to § 1325(a)(5). The chapter 11 provision, § 1129(b)(2)(A)(i), is similar.

or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

STATEMENT OF THE CASE

Respondent Elray Rash has a freight-hauling business. He derives his income from a Kenworth T600A tractor truck. Rash bought a new truck in 1989 for $73,700, and financed its cost (less trade-in) from the dealer, agreeing to pay $1,610 a month for 60 months and pledging the truck as collateral. The dealer assigned the secured loan to petitioner Associates Commercial Corporation ("Associates"), which holds a valid lien on the truck to secure Rash's payment obligations.

In early 1992, Associates agreed to reschedule the truck loan, lowering the monthly payments from $1,610 to $1,408. Pet. App. 101a. This relief was not sufficient to solve Rash's financial difficulties, so in March 1992, he and his wife, respondent Jean Rash, filed a joint petition for bankruptcy, and proposed a payment plan under chapter 13 of the Bankruptcy Code.

At the time of the bankruptcy filing, the balance due to Associates on the truck loan was $41,171. In their plan, the Rashes valued the truck at only $28,500 and proposed a "cram down" of Associates' secured claim pursuant to § 1325(a)(5)(B) of the Code. Specifically, the plan proposed that respondents would keep the truck, and Associates would be allowed a secured claim of only $28,500. The balance of Associates' debt would be treated

as an unsecured claim. The plan, as ultimately confirmed, contemplated that unsecured creditors would receive only about 15 cents on the dollar—and those payments would not be made for several years. *Id.* at 38a n.24.

Associates asked the bankruptcy court to lift the automatic stay so that it could repossess the truck. Associates also filed a proof of claim which asserted that the entire $41,171 debt was secured. Respondents objected to the claim, saying the truck was worth only $28,500, and therefore Associates' secured claim was limited to this amount. Respondents neither disputed that they owed $41,171 nor challenged the validity of Associates' lien on the truck. *Id.* at 3a.

At the hearing on these matters, there was no real dispute about the retail or replacement value of the truck to respondents. Associates' expert witness testified that the truck's "current market value"—which he defined as the fair value that a person walking in off the street would pay to a dealer—was $41,000. *Id.* at 3a-4a. Respondents' expert witness similarly testified that the truck's retail value was $42,500, a figure he derived from the industry blue book. Nevertheless, he stated that the "value" of the truck was what a dealer would pay—*i.e.*, wholesale value—which he calculated by deducting 25% from his estimate of the retail value, arriving at a figure of $31,875. *Id.* at 4a. In short, as the bankruptcy court noted, "[b]oth experts agreed as to the retail value of the truck; they just disagreed as to whether the retail or wholesale value should be used." *Id.* at 102a.

The sole issue decided by the bankruptcy court was the appropriate standard for valuing the truck as collateral. The bankruptcy court framed the issue as follows:

> Associates maintains that the truck should be valued according to its retail value i.e. what the Debtor would be required to pay to replace it. Debtor disagrees, arguing that the appropriate standard of valuation should be the wholesale value of the truck i.e. what the truck is worth to the dealer. . . . The outcome of this issue will decide how Associates' claim is treated in Debtor's plan.

Pet. App. 111a.

The bankruptcy court viewed the issue before it as a pure question of law—whether retail value or wholesale value is the appropriate standard of valuation when a debtor proposes to "cram down" a plan over a secured creditor's objection. The court concluded that under § 506(a), "value is defined from the creditor's perspective: How much would the creditor realize upon repossession and disposition of the collateral . . . ?" *Id.* at 118a. Based on this interpretation of the statute, the bankruptcy court adopted a wholesale valuation. *Id.* at 118a-119a n.3. Then, after valuing the truck at $31,875, the bankruptcy court denied Associates' motion to lift the automatic stay. Although the court acknowledged that Rash "does not have any equity in the truck," it found that "Debtor has demonstrated the necessity of the truck for" a successful reorganization. *Id.* at 119a.

In response to the bankruptcy court's finding, the Rashes amended their plan to allow Associates a secured claim of $31,875, to be paid over 58 months (with interest at nine percent) . The amended plan was then confirmed over Associates' objection. As a result, the Rashes' payment obligation on the secured claim was reduced to $31,875, rather than the entire loan balance of $41,171. By paying that amount they could discharge Associates' security interest and retain a truck worth $42,500 to them. The Rashes are leasing the truck to a third party for approximately $1,200 per week, while paying Associates about $158 per week under the plan. Pet. App. 87a.

Associates timely appealed the final order approving confirmation of the chapter 13 plan, as well as the order denying relief from the stay to the United States District

Court for the Eastern District of Texas. Exercising jurisdiction under 28 U.S.C. §§ 157 and 1334, that court affirmed. Pet. App. 88a.

A panel of the court of appeals reversed. Pet. App. 100a-109a. The panel concluded that the valuation of the truck should not be based on what Associates could obtain by foreclosing, but on the use contemplated under the Rashes' plan. Because the plan prevented Associates from foreclosing on the truck, but instead allowed the debtors to continue using the collateral, the panel found that the appropriate value was the "value to the debtor of retaining and using the property," which "can best be measured by what he would have to pay to purchase another truck." Pet. App. 105a-106a.

A petition for rehearing *en banc* was granted. While that petition was pending, the First, Eighth and Ninth Circuits issued decisions agreeing with the panel below. Nevertheless, by a vote of 9-6 (with Judges Jones, Higginbotham and Garwood recused), the *en banc* court overturned the panel decision, rejected the holdings of the other circuits, and held that petitioner's secured claim was limited to the foreclosure value of its collateral. Pet. App. 1a-51a. The majority ruled that "[u]ltimately, it is the creditor's interest that is being valued under § 506(a), and such valuation must account for the fact that the creditor's interest is in the nature of a security interest, giving the creditor the right to repossess and sell the collateral and nothing more. Therefore, the valuation should start with what the creditor could realize by exercising that right." Pet. App. 14a.

SUMMARY OF ARGUMENT

1. In Section 506 of the Bankruptcy Act, Congress established and defined the rights of secured creditors in bankruptcy when the value of the secured property is worth less than the debt. The statute plainly grants the creditor a secured claim equal to the value of the collateral and then the provision mandates that this "value shall be determined in light of the purpose of the valuation and of the proposed disposition *or* use of such property . . . ." 11 U.S.C. § 506(a) (emphasis added). Under the ruling below the conjunctive "or" is rendered a nullity because the valuation is identical whether the property is disposed of or used by the debtor. Only by recognizing that the valuation differs depending upon whether the property is relinquished by the debtor or kept for his or her personal use is the "disposition or use" language given full effect as required by traditional rules of statutory construction. See *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 36 (1992).

The suggestion that the value of the collateral should always be understood as involving "foreclosure" value is inconsistent with this Court's analysis of the term value in *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531 (1994). In *BFP* both the majority and dissent agreed that the unadorned term value does not mean foreclosure value. Thus, if Congress had intended a liquidation standard, it would not have used the term "value" and it would not have insisted that valuation be performed in light of "disposition or use." Congress knows all too well how to limit creditor's interests to liquidation values.

Under petitioner's proposed approach, the inquiry is quite simple. The court must take into account the debtor's choice to retain and use the collateral. The court then "values" the property in light of this use by asking how much is the fair market value of this particular piece of property if the debtor replaced it by purchasing it from a willing seller. Under that legal standard, it is clear that the Rashes would have paid $41,000 to obtain the tractor truck they chose to retain as their primary income for funding their chapter 13 plan.

2. The key to the court of appeals' holding is its reliance upon principles of federalism to require petitioner to

demonstrate that its interpretation is "clearly" supported by the language of the statute. But the court of appeals' methodology is fundamentally wrong because it is the court's expansion of the debtor's rights that does harm to principles of federalism.

The argument of the court below fundamentally confuses rights and remedies. Under state law, petitioner is entitled to full payment. It is only the intervention of bankruptcy that modifies that right. That limitation on the creditor's rights, however, should be strictly limited unless Congress has expressed an unmistakable intent further to restrict the creditors' rights, which Congress has not done.

In any event, this is not a case like *BFP* where the statute essentially is silent on the proper approach and the court looks to state law to provide a backdrop for defining the parties' rights. Here, Congress has spoken plainly that the debtor's decision to "use" the property must be considered by the courts in valuing the creditor's secured interest. That statutory mandate, by itself, resolves this case in petitioner's favor.

Petitioner's interpretation of § 506(a) constitutes a reasonable accommodation of the relevant interests of the parties to the bankruptcy. To be sure, the secured creditor is afforded somewhat greater protection, but that simply reflects the greater risk that the secured creditor assumes by not being able to repossess the collateral. That certainly is a fair exchange for having a plan crammed down over the creditor's objection. As for the unsecured creditors, they cannot reasonably expect to receive anything more or less than they would obtain in a chapter 7 liquidation. With regard to the debtor, he or she is permitted to keep the property and in this case to use it as the primary basis for funding the chapter 13 plan.

3. The Seventh Circuit's novel approach should be rejected. *In re Hoskins*, 102 F.3d 311 (7th Cir. 1996). Finding the language of the statute unhelpful, that court turned to economic principles to determine what a hypothetical creditor and debtor would do to resolve this problem. According to the court, they would split the difference and thus that is the approach mandated by that court.

There is simply no basis for abandoning the traditional methods of statutory construction in this case. The language and structure of the statute do provide an answer: the secured interest should be measured by the amount the debtor would pay to replace the collateral thereby reflecting the debtor's choice to "use" rather than dispose of the property. If a "split the difference" solution is in some sense preferable to the approach currently embodied in § 506(a), then that is obviously a matter for Congress not this Court.

ARGUMENT

The issue presented in this case is the proper measure for valuing a secured creditor's claim when the debtor proposes to retain the collateral and use it as part of a chapter 13 plan. The *en banc* decision below stands alone in concluding that the wholesale value—or what the secured creditor might receive on foreclosure—is the appropriate measure. On the other side, five circuits have concluded that when the debtor proposes to use the collateral, its value should be determined by reference to that use—or what the debtor would have to pay for similar property of like character and condition. *Taffi* v. *United States* (*In re Taffi*), 96 F.3d 1190, 1192 (9th Cir. 1996) (*en banc*), *petition for cert. filed* (U.S. Oct. 31, 1996) (No. 96-881); *Metrobank* v. *Trimble* (*In re Trimble*), 50 F.3d 530, 531-32 (8th Cir. 1995); *Winthrop Old Farm Nurseries, Inc.* v. *New Bedford Inst. for Sav.* (*In re Winthrop Old Farm Nurseries, Inc.*), 50 F.3d 72, 74-75 (1st Cir. 1995); *Huntington Nat'l Bank* v. *Pees*

(*In re McClurkin*), 31 F.3d 401, 404 (6th Cir. 1994); *Coker* v. *Sovran Equity Mortgage Co.* (*In re Coker*), 973 F.2d 258, 260 (4th Cir. 1992). Sometimes this standard is expressed in terms of "retail value," *e.g.*, *In re Trimble*, 50 F.3d at 532, and sometimes it is expressed in terms of "fair market value." *In re Taffi*, 96 F.3d 1190. In either case, the valuation reflects what the debtor would have to pay for a comparable asset outside of bankruptcy, and is dramatically different from the liquidation valuation adopted by the majority below.

Most recently, two circuits have essentially split the difference by adopting yet another rule—"the average of retail and wholesale value of the collateral." *In re Hoskins*, 102 F.3d 311, 316 (7th Cir. 1996); *General Motors Acceptance Corp.* v. *Valenti* (*In re Valenti*), 1997 WL 31577, at *1 (2d Cir. Jan. 15, 1997) (approving a local bankruptcy rule requiring "the average of trade-in and retail values" in the applicable Official Used Car guide "[u]nless otherwise determined by the court"). This rule, albeit incorrect, also conflicts with the ruling below.

For the reasons set forth hereafter, both the liquidation value approach adopted by the Fifth Circuit and the "split the difference" rule of the Seventh and Second Circuits are contrary to the language and structure of the Bankruptcy Code and are inconsistent with the prior decisions of this Court. The correct measure is the replacement or retail value of the collateral—what the debtor would have to pay for similar property.

I. THE BANKRUPTCY CODE REQUIRES A REPLACEMENT VALUATION OF COLLATERAL THAT THE DEBTOR PROPOSES TO RETAIN AND USE IN A BANKRUPTCY REORGANIZATION UNDER CHAPTER 13.

A. The Plain Meaning of Section 506(a) Supports Petitioner's Interpretation of the Statute.

Section 506 of the Code establishes the claims of secured creditors. Subsection (a) defines the claims of *under-*

secured creditors—that is, it applies when the debtor has no equity in the collateral because the collateral is worth less than the debt. In these circumstances, § 506(a) " 'requires a bifurcation of a "partially secured" or "undersecured" claim into separate and independent secured claim and unsecured claim components." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 239 n.3 (1989) (quoting 3 *Collier on Bankruptcy* ¶ 506.04, at 506-15 (15th ed. 1988)).

Section 506(a) has two sentences. The first provides that the creditor has a secured claim equal to the value of the collateral and that the balance of the allowed claim is unsecured:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

That sentence says nothing about *how* to value the collateral; it only specifies that it is the collateral that must be valued. As this Court has noted: "The phrase 'value of such creditor's interest' in § 506(a) means 'the value of the collateral.' " *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 372 (1988) (citation omitted). See *infra* pp. 31-33.

It is the second sentence of § 506(a) that tells bankruptcy courts *how* to value the collateral:

> Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

To be sure, this language does not purport to establish a fixed mathematical formula for valuation. But, if it is

to mean anything at all, it must be read to give significance to both "the purpose of the valuation" and "the proposed disposition *or* use of such property" in deciding how the collateral should be valued. Otherwise, there would be no point for Congress to specify that "value shall be determined" in light of those factors.

Under the Fifth Circuit's holding, however, a liquidation measure of value is *always* used, regardless of the "proposed disposition or use" of the collateral and regardless of the "purpose of the valuation." This interpretation must be rejected because it fails the common-sense requirement that "a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992).[8] Other courts have rightly rejected this interpretation of § 506(a) because it does not "'give effect, if possible, to every word Congress used.'" *Coker* v. *Sovran Equity Mortgage Co.* (*In re Coker*), 973 F.2d 258, 260 (4th Cir. 1992) (quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979)). "'If the first sentence of § 506(a) were interpreted to mean that the value must be fixed at the amount which the creditor would receive on foreclosure, then the last sentence of the statute which provides that the value should be determined in light of the purpose of the valuation and of the proposed disposition or use of the property, would be surplusage.'" *Metrobank* v. *Trimble* (*In re Trimble*), 50 F.3d 530, 531 (8th Cir. 1995) (citations omitted).

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[8] As this Court stated, in another case involving the interplay of § 506 and chapter 13:

> We generally avoid construing one provision in a statute so as to suspend or supersede another provision. To avoid deny[ing] effect to a part of a statute, we accord significance and effect . . . to every word.

Rake v. *Wade*, 508 U.S. 464, 471 (1993) (internal quotation marks and citations omitted) (Court's brackets and ellipses).

B. The Measure of Value Must Reflect the "Proposed Disposition or Use" of the Collateral, and That Supports Valuing the Collateral as if the Debtor Had to Purchase It Elsewhere.

The most telling clause in § 506(a), for purposes of this case, is its directive that valuation reflect "the proposed disposition or use" of the collateral. The language embodies two ideas, both of which were ignored by the majority below. The first is that the valuation must reflect the use of the collateral that is proposed under the plan rather than some alternative hypothetical use or disposition that the plan does not propose. The second is that there must be a clear distinction for valuation purposes between a "proposed disposition" and a "proposed . . . use" of property. Thus, where a plan proposes to surrender the collateral to the secured creditor pursuant to § 1325(a)(5)(C), that would be a "proposed disposition," and the value of the secured claim (for purposes of determining the amount of the unsecured deficiency) would appropriately be measured by the value of the collateral to the creditor. Similarly, where the collateral is to be sold at auction, the value of the secured claim would be the auction or liquidation value. On the other hand, where a plan proposes a "use" of collateral by a debtor, the statute directs that the valuation be based on this use—and that equates to what the debtor would pay to purchase comparable property elsewhere.

The Rashes' plan did not propose the "disposition" of the truck collateral pledged to Associates. Instead, the plan specified that the Rashes would retain the truck and use it to generate future income. This is a "use" by the debtor—and the only way to read the statute coherently is to value the truck in accordance with that proposed use, which must mean something different from the value of the property if the Rashes had disposed of it. Nonetheless, the majority below treated the "proposed . . . use" by the debtor as irrelevant, and instead valued the collateral based on a theoretical "disposition" by Associates,

which the plan did not propose. This interpretation mistakenly reads "proposed . . . use" out of the statute.[4]

In seeking to reconcile its holding with the second sentence of § 506(a), the majority below advanced two principal arguments, both of which are seriously flawed. First, the majority asserted that it was not *required* by the language of § 506(a) to consider the "proposed disposition or use" of the property in valuing the collateral:

> The phrase "in light of," however, suggests that the court need only consider the proposed disposition or use . . .; it does not necessarily dictate that such disposition or use will necessarily affect the result. We would expect Congress to use more forceful language if the proposed disposition or use of the collateral were to have a positive or negative effect on value in every case.

Pet. App. 24a-25a (citation and footnote omitted).

The argument simply ignores the relevant language of the provision. Congress *did* use forceful language. Section 506(a) contains the mandatory verb "shall," not a permissive phrase such as "may consider." It states: "Such value *shall* be determined in light of . . . the proposed disposition or use"—language that cannot be squared with the conclusion below that the actual disposition or use is of no moment in applying § 506(a). (Emphasis added). This phrase cannot fairly be read as giving courts the discretion, at a hearing on a specific "proposed disposition or use," to value the property based on an *entirely different* disposition or use, or to allow debtors to "use" encumbered property while paying only the value of the

[4] The Fifth Circuit's standard also ignores the statutory command that the valuation would vary with "the purpose of the valuation." If a foreclosure standard must be applied at the *plan confirmation stage* of a bankruptcy case, when there is no longer any uncertainty as to the proposed disposition or use, then it is hard to imagine any other stage of the case or any other purpose for which a different measure of value would prevail.

property as if it had been disposed of. As the Fourth Circuit colloquially explained: "If the 'proposed use or disposition' provision is to have any meaning, the debtor should not be permitted to 'eat with the hounds and run with the hares.'" *Coker* v. *Sovran Equity Mortgage Co.* (*In re Coker*), 973 F.2d 258, 260 (4th Cir. 1992) (quoting *In re Crockett*, 3 B.R. 365, 367 (Bankr. N.D. Ill. (1980)).

The majority's second argument seeks to give the second sentence of § 506(a) an extraordinarily crabbed meaning by positing that in a rare case, bankruptcy judges applying this language would have the *discretion* to consider the actual disposition or use of the collateral if "the manner of that retention is so unusual or extreme as to constitute a use that is destructive of the collateral." Pet. App. 26a. "For example, the collateral may consist of equipment which is being used by the debtor twenty-four hours per day, so that its use is causing rapid deterioration." *Id.* at 25a.

This example demonstrates the extent to which the Fifth Circuit misunderstood the statute. Section 506(a) deals with the value of the collateral *at the time of its valuation.* Under any standard of valuation, an asset is not worth any less *at the time it is valued* because the debtor later will use it 24 hours a day. The intensity of the anticipated future usage may be important in deciding whether the creditor is adequately protected under § 361 or is receiving a distribution that preserves its secured position under § 1325(a)(5)(B)—but it has no bearing whatsoever on the determination of the amount of the secured claim under § 506(a). For example, if collateral is anticipated to depreciate rapidly after confirmation, the secured claim might have to be paid out over a shorter time period or with a higher interest rate—but the allowed amount of the claim itself would not change.[5] Thus, the majority's reliance on rapid deprecia-

[5] Indeed, in this very case, the bankruptcy court rejected the idea "that the value of collateral should be adjusted upward if its

tion of collateral as the sole purpose of the second sentence of § 506(a) fails to withstand analysis.

Nor is there any merit in the majority's more amorphous suggestion that there may be some unspecified "equitable consideration" which would permit wholesale value to serve as a "*starting point* for the valuation," leaving a bankruptcy court free to "make additions to or deductions from this amount depending upon 'equitable considerations arising from the facts of the case.'" Pet. App. 48a (Court's emphasis). It is clear that under the opinion below, foreclosure value is not only the "starting point." It also is the ending point of the analysis. Under the majority's approach, there are no identified circumstances in which a secured claim would be valued at more than foreclosure value.[6]

In sum, there is simply no ambiguity in the phrase "proposed disposition or use." It focuses on a central decision that a debtor must make in proposing a plan—whether to surrender the collateral for disposition by the creditor, or to continue to use it by invoking the cramdown power. By adopting a valuation measure based on a hypothetical foreclosure that has not been proposed, the decision below makes the decision whether to dispose of the collateral or to use it irrelevant to the valuation issue, in direct violation of the statutory text.[7]

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use in the debtor's hands is particularly detrimental to its value." Pet. App. 118a n.2. The court explained correctly that such a detrimental use might call for a higher interest rate or a shorter payment schedule, but has no effect on the § 506(a) valuation.

[6] By contrast, under the valuation approach advocated herein, the valuation would be dependent on the facts and circumstances on a case-by-case basis, as Congress intended. *See infra* p. 39.

[7] The court below also suggested that it is meaningful to discuss the value to the creditor of the use of property by the debtor. Pet. App. 22a (collateral in the hands of the debtor "is worth something to *both* the debtor and the creditor") (emphasis added). This is a tortured and unnatural reading. When a debtor is using property, that property has no value to the creditor other than the

C. Petitioner's Interpretation Is Consistent With the Structure of Section 1325(a).

The Fifth Circuit's interpretation is not only contrary to the language of § 506(a), but also is inconsistent with the structure of § 1325(a). That section sets forth the requirements for treatment of creditors in chapter 13. With respect to secured creditors, Congress set forth a lengthy description of what the secured creditor must receive if the debtor proposes to retain the collateral for use by the estate. Under § 1325(a)(5)(B)(ii), the secured creditor must receive "the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim [that] is not less than the allowed amount of such claim."

Under the Fifth Circuit's interpretation, this elaborate language means nothing more than that the secured creditor must receive the liquidation value of its collateral. If this is what Congress meant, surely "it could have expressed such an intent much more clearly and simply." *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176, 188 (1988). This is especially true because Congress already had in hand a well-established standard for requiring payment of liquidation value. That is the "best interests of creditors" test, which requires that creditors receive as much as they would have received if the estate's assets were liquidated in a chapter 7 proceeding. *E.g.*, 11 U.S.C. §§ 1129(a)(7)(A), 1225(a)(4), 1325(a)(4).

If Congress had meant to adopt a liquidation value standard, it would have drafted § 1325(a) in a simple and straight-forward way. It would have made the "best interests of creditors" test of § 1325(a)(4) applicable to all creditors (*i.e.*, by striking the word "unsecured" which now appears in that section), and would have

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amount which the debtor will pay on its loan. Thus, measuring the value to the creditor of the collateral's use by the debtor is either meaningless (*i.e.*, zero) or circular (the amount of the allowed secured claim).

eliminated § 1325(a)(5)(B)(ii) entirely. Instead, as the majority below would have it, Congress drafted the elaborate language of § 1325(a)(5)(B)(ii) to provide nothing more than that secured creditors would receive the liquidation value of their collateral, and then used words of limitation to make the best interests of creditors test of § 1325(a)(4) applicable only to unsecured creditors, because secured creditors' entitlement to liquidation value was already established in § 1325(a)(5)(B)(ii).[8] The Court should not lightly presume that Congress chose to express its intent in such an inelegant, if not bizarre, manner. The much more sensible construction of § 1325 (a)(5)(B)(ii) is that it was intended to require payment of more than liquidation value—if that reflected the proposed use of the collateral.

D. Petitioner's Fair Market Value Standard Is Consistent With This Court's Prior Cases.

Although this Court has never addressed the specific issue presented here, a number of its cases suggest strongly that the majority's foreclosure value standard cannot pass muster. For example, in *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531 (1994), this Court was called upon to interpret the "reasonably equivalent value" standard of valuation for fraudulent conveyances under § 548(a)(2). In *BFP*, this Court held that the price received at a regularly-conducted foreclosure sale constituted "reasonably equivalent value" within the meaning of the statute.

A careful reading of the decision makes it clear that neither the majority nor the dissent regarded foreclosure

[8] It is further instructive that the chapter 11 best interests of creditors test applies to all creditors, secured and unsecured. 11 U.S.C. § 1129(a)(7)(A). Thus, not only did Congress know how to make such a test applicable to all creditors, but on the majority's view, the best interests of creditors test for secured creditors in chapter 11 would be redundant, because the same requirement is embodied in § 1129(b)(2)(A)(i)(II), the chapter 11 analogue to § 1325(a)(5).

value as the ordinary meaning—let alone the sole meaning—of "value." The dissent was explicit on this point, declining to equate foreclosure value with "value" under the Bankruptcy Code. "The term of choice in the bankruptcy setting seems to be 'value,' unadorned and undefined, which appears in more than 30 sections of the Bankruptcy Code, but which is, with respect to many of them, read to mean 'fair market value.' " *BFP* v. *Resolution Trust Corp.*, 511 U.S. at 550 n.1 (Souter, J., dissenting) (citing § 506(a) as an example).

The same conclusion is equally evident from the majority opinion. The majority approved a foreclosure valuation for fraudulent conveyance purposes because "Section 548 . . . seemingly goes out of its way to avoid" the standard term "fair market value," and chose to replace "standard legal terminology with a neologism." 511 U.S. at 537. There is no such neologism in § 506(a), only the conventional term "value." And in that context, the Court recognized that when property is not being sold at foreclosure, bankruptcy judges should generally "refer to the traditional common-law notion of fair market value as the benchmark," *id.* at 548; that is, the price that property would be expected to bring when sold voluntarily under normal conditions, which "is the very *antithesis* of forced-sale value." *Id.* at 537. Thus, both opinions in *BFP* confirm that there is no basis for departing from the usual understanding that "value" means fair market value and does not mean foreclosure value.

Another decision of this Court undermines the Fifth Circuit's assumption that the economic results of foreclosure are the proper measure of the collateral's value. The specific issue in *United Savings Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988), was whether an undersecured creditor was entitled to payment for the use of its collateral during the bankruptcy proceeding. The creditor argued that monthly payments were

necessary to protect its "interest in such property" under § 361. *Id.* at 365. "The crux of the present dispute is [whether] . . . the phrase 'interest in property' also includes the secured party's right (suspended by the stay) to take immediate possession of the defaulted security, and apply it in payment of the debt." *Id.* at 370-71.

This Court concluded that the secured creditor's "interest in property" should not be determined by reference to the results of foreclosure. "The term 'interest in property' certainly summons up such concepts as 'fee ownership,' 'life estate,' 'co-ownership,' and 'security interest' more readily than it does the notion of 'right to immediate foreclosure.'" *Id.* at 371. And this Court expressly reached the same conclusion with respect to § 506(a), the section most relevant to the instant case:

> In subsection (a) of this provision [§ 506] the creditor's "interest in property" obviously means *his security interest without taking account of his right to immediate possession of the collateral on default.* If the latter were included, the "value of such creditor's interest" would increase, and the proportions of the claim that are secured and unsecured would alter, as the stay continues. . . . .

Id. at 372 (emphasis added). In sum, this Court's rejection of foreclosure as the litmus test for valuation is contrary to the holding of the court below, which used the creditor's ability to take possession and sell at foreclosure as the only measure of its interest in the collateral.

More broadly, the notion embraced by the majority below—that a secured creditor's claim can be satisfied by payment of no more than foreclosure value—is contrary to this Court's understanding of how the Bankruptcy Code deals with a secured creditor's rights. In *Dewsnup* v. *Timm,* 502 U.S. 410 (1992), this Court interpreted the phrase "allowed secured claim" in § 506(d) as having a different meaning than the same phrase in § 506(a), to prevent a debtor's benefitting from retaining collateral at the expense of its secured creditor by "strip[ping] down" the creditor's lien. *Id.* at 417. This Court reasoned that "[a]ny increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the creditor," *id.*, and recognized that apart from reorganization proceedings, "no provision of the pre-Code statute permitted involuntary reduction of the amount of a creditor's lien for any reason other than payment on the debt." *Id.* at 418-19. *Dewsnup*'s approach of preserving secured creditor's traditional rights is thus diametrically opposed to the effort by the court below to narrow those rights, and to allow the debtor to retain any surplus value over what the creditor could obtain through foreclosure.

E. The Appropriate Valuation Standard Is "Fair Market Value"—the Amount the Debtor Would Pay to Purchase the Property Elsewhere.

For the reasons set forth above, the language of § 506(a), the structure of § 1325(a), and this Court's precedents undermine the conclusion of the court below that foreclosure value is the relevant measure of valuation under § 506(a) when a debtor's plan proposes to retain and use the collateral. The more natural and sensible reading of the statute is to recognize that the relevant consideration is how much the debtor would have to pay to obtain the property he or she proposes to "use."

This measure of value is consistent with the traditional notion of value as "fair market value," as determined in the "market" defined by the debtor's proposed use. This is very different from the liquidation value measure adopted by the court below, because, as this Court recognized, fair market value and foreclosure value are mutually exclusive. *BFP* v. *Resolution Trust Corp.,* 511 U.S. 531, 536-39 (1994). See discussion *supra* pp. 18-19.

However, the adoption of a fair market value standard, without more, is not sufficient to decide this case and

others like it. The relevant "market" for the fair market value determination must be defined. Otherwise, the uncertainty that has plagued the lower courts will continue—with some judges erroneously looking to a market in which secured creditors sell collateral at foreclosure, while other judges correctly look to the market in which debtors purchase such property for their use.

Stated differently, the issue of valuation cannot be determined in a vacuum, but only in the context of a relevant market. And the nature and character of that relevant market is defined by the standard set forth in the second sentence of § 506(a), based on the purposes of the valuation and the proposed use or disposition of the collateral. Thus, where a debtor proposes to use collateral, the relevant market is that of typical purchases by debtors in similar circumstances. If the goods in question, for example, are typically purchased from a retailer, then the retail price for comparable items would govern. If, on the other hand, the collateral consists of used household goods, which are typically bought and sold (to the extent they have any value at all) in flea markets, rummage sales, or through classified advertisements, both the relevant market and the resulting value will be defined by the typical way in which such goods are bought and sold.

Accordingly, under petitioner's interpretation, value will vary with the circumstances, precisely as Congress intended that it would. For example, if the debtor is a retailer who buys for resale at wholesale prices, the relevant market is the wholesale market, and wholesale value would be proper. On the other hand, if the debtor is a consumer who buys in the retail market, then retail values should be used.[9]

[9] Tort law similarly recognizes that the value of property which has been destroyed is measured differently for different parties: "the consumer can recover the retail price; the retail dealer, the wholesale price. The manufacturer, who does not buy in a market, receives his selling price." *Restatement (Second) of Torts* § 911 cmt. d, at 473-74 (1979).

This is not to say, of course, that the value of collateral retained by a consumer is necessarily the precise amount published in a "blue book" or other guideline. To the extent that a "blue book" price reflects warranties or other elements of value which the debtor is not receiving when it retains the collateral under its plan, Pet. App. at 30a-32a, an adjustment may be necessary so that the valuation more accurately reflects the precise nature of the asset that the debtor is retaining. Similarly, there would be an adjustment to the extent that part of the fair market value of the truck is derived from items to which the secured creditor's lien does not extend.[10] But in any case, the valuation in question would reflect the nature of the debtor's rights, the scope of the creditor's interest, and the relevant market as defined by the proposed use of the collateral, all as required by § 506(a).

II. THE FIFTH CIRCUIT ERRED IN ITS INTERPRETATION AND APPLICATION OF STATE LAW, THE STATUTORY LANGUAGE, AND LEGISLATIVE HISTORY AND POLICY.

The majority below was led astray from this sensible and straightforward reading of the statute based on a number of arguments. None of these arguments has merit, and none supports the majority's conclusion.

[10] For example, if part of the value of Rash's truck resulted from accessories that he installed as to which petitioner's lien would not extend as a matter of applicable non-bankruptcy law, an adjustment in valuation also would be required. The same principles would apply when the value of the collateral is not determined by published listings in "blue books," but requires evidence as to going concern or other values. Again, a case-by-case determination is appropriate. *See, e.g.*, S. Rep. No. 95-989, at 54 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840 ("value" should not be construed "in every case" to mean "forced sale liquidation value or full going concern value").

A. The Fifth Circuit's Tortured Reading of Section 506(a) Is Not Required to Accommodate State Law.

The central premise of the Fifth Circuit's opinion is that allowing a secured creditor to receive more than foreclosure value would be inconsistent with state law. As a result, the court below insisted on the most explicit statutory language and the most unequivocal expression of legislative intent before it would accept any different valuation. *E.g.*, Pet. App. 10a ("the statutory language must clearly compel any departure from state law"); *id.* at 28a ("the language of that subsection does not provide the clear textual guidance necessary to command the departure from state law effected by such a valuation.") Similar expressions appear no less than three other times in the *en banc* opinion, see, *e.g.*, Pet. App. 15a, 37a, 51a, and that logic pervasively distorts virtually all of the Fifth Circuit's arguments.

The Fifth Circuit's premise is fundamentally flawed in two respects. First, the Fifth Circuit misapprehended the rights of a secured creditor under state law by assuming, incorrectly, that these rights are limited to the receipt of foreclosure value. Second, the Fifth Circuit incorrectly concluded that the Bankruptcy Code is either intended to or required to incorporate state law foreclosure remedies in determining parties' rights under a chapter 13 plan.

1. The holding below rested on the erroneous premise that a secured creditor's only right under state law is "to repossess and sell the collateral *and nothing more.*" Pet. App. 14a (emphasis added). The assumption that state law limits secured creditor rights to foreclosure value is not unique to the *en banc* majority; it forms a basis for the Seventh Circuit's "split[] the difference" rule as well. *In re Hoskins,* 102 F.3d 311, 313-14 (7th Cir. 1996) (majority opinion); *id.* at 315 (concurring opinion). But it is flatly wrong.

A secured creditor certainly has the right under state law to sell collateral at foreclosure—but that is far from its only right. Rather, the creditor's most important right under state law is to be *paid in full*—and to enforce that right, the creditor is entitled "to retain the lien until the debt [has been] paid off." *Nobelman* v. *American Sav. Bank*, 508 U.S. 324, 329 (1993). On the other side of the coin, the debtor has no right under state law to keep the collateral after a default—and certainly no right to a discharge of the lien—unless he pays the entire debt. See, *e.g.*, Uniform Commercial Code § 9-506, as adopted in Texas, Tex. Bus. & Com. Code Ann. § 9.506 (debtor in default may redeem collateral upon "tendering fulfillment of all obligations secured by the collateral" plus the secured creditor's expenses and, if so provided in the loan documents, its attorney's fees).

The majority's analysis of state law is thus flawed because it seeks to define the extent of state law property rights solely by reference to what might be recovered through the use of certain state law remedies. Its analysis of state law begins with the statement that "Texas law offers a secured party two *remedies* against a debtor in default," Pet. App. 9a (emphasis added), but it leaps to the conclusion that this reflects a limitation on the creditor's substantive state law rights. *Id.* ("ACC was secured under § 9.504(a) and § 9.505 to the extent of what it could realize by resort to these two remedies.") But the inadequacy of particular state law remedies to fully vindicate a state law right does not mean that the right itself has been curtailed. The only substantive state law limitation on a secured creditor's rights to recovery from its collateral is that it cannot recover more than the amount of its debt. The fact that upon foreclosure the asset value is not sufficient for that purpose is a matter of economic happenstance; it is not a limitation of the creditor's substantive state law property rights.

Significantly, the secured creditor's entitlement to repayment of its full debt is firmly rooted in debtor-creditor

law. During the Depression, Congress enacted a bankruptcy provision that allowed farmers to discharge mortgages without repaying the entire debt. In finding the statute to be unconstitutional, this Court pointed out how unprecedented it was: "No instance has been found, except under [this] Act, of either a statute or decision compelling the mortgagee to relinquish the property of the mortgagor free of the lien unless the debt was paid in full." *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 579 (1935). More recently, in *Dewsnup* v. *Timm*, 502 U.S. 410, 419 (1992), this Court quoted the foregoing passage from *Radford*, and stated: "Congress must have enacted the Code with a full understanding of this practice," and declined to disturb "what was bargained for by the mortgagor and mortgagee." *Id.* at 417.

Thus, when § 506(a) was adopted, Congress knew that the value of having a lien was not limited by state law to the amount that the creditor could recover by disposing of the collateral. Congress also knew that under state law, debtors who want to keep property that they have pledged as collateral must pay the full amount of the secured debt. Congress elected to modify those rights to afford some relief to debtors. To keep collateral, they need not repay the full debt, as they would under state law, but only an amount equal to the value of the collateral. See §§ 1129(b)(2)(A), 1225(a)(5)(B) and 1325(a)(5)(B).[11] But under the Fifth Circuit's own reasoning,

[11] In addition, a chapter 13 plan must deal with the unsecured portion of the claim (*i.e.*, the amount by which the debt exceeds the value of the collateral), but unsecured claims are often discharged with the payment of a pittance (as in this case) or nothing at all. This is because a chapter 13 plan can be confirmed under the Bankruptcy Code even if unsecured creditors receive little or nothing, as long as two pertinent requirements are met. First, unsecured creditors cannot receive less under a chapter 13 plan than they would in a chapter 7 liquidation. *See* § 1325(a)(4). Second, the debtor must commit to the plan all of his projected disposable income for the next three years. § 1325(b). Thus, a chapter 13 plan does not have to pay anything to unsecured creditors if the debtor does not have sufficient non-exempt assets or disposable income.

absent the clearest indication, there is no reason to suppose that Congress went beyond this explicitly-enacted departure from state law to disturb the balance between debtors and creditors in a way that would deprive creditors of the economic benefits that flow from a debtor's desire to retain his property rather than see it sold at foreclosure.

The Bankruptcy Code should not be presumed to have overridden creditors' state law entitlements. Even in Supremacy Clause cases, where Congress has enacted an express pre-emption provision and thus has satisfied the clear statement requirement for pre-emption, this Court still insists that the express provision be construed narrowly to preserve as much of state law as possible. See, *e.g.*, *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). By similar reasoning, § 506(a) should be construed narrowly not to unduly interfere with creditors' state law right to full payment. Thus, although the court of appeals' basic instinct to preserve substantive state law rights was sound, its application was absolutely wrong.

The same conclusion is evident when the matter is analyzed from the standpoint of the debtor's rights under state law. Under the majority's holding, not only can a debtor retain collateral by paying less than the amount of the debt, but the debtor is not even required to pay what it would cost to purchase the same property elsewhere. There is certainly nothing in state law that gives debtors a general dispensation to purchase their vehicles at wholesale when everyone else must pay retail, and nothing in state law to suggest that the rule should be different when the vehicle is pledged to a secured creditor. And "[u]nless some federal interest requires a different result, there is no reason why" a debtor should obtain an expansion of his substantive state law entitlements "simply because [he]

is involved in a bankruptcy proceeding." *Butner* v. *United States*, 440 U.S. 48, 55 (1979).

In sum, in order to interpret the Bankruptcy Code in a way that most closely mirrors the outcome under state law, the appropriate valuation standard is one which would follow the dictates of § 506(a), and base the valuation on the proposed treatment of the collateral under the debtor's plan. The creditor stands to recover less for the collateral if it is surrendered, and more if the debtor continues making payments under a plan in an attempt to keep the collateral. This is much the same as would obtain under state law, where the creditor will receive more than foreclosure value from a debtor who seeks to retain the collateral. The Fifth Circuit's approach, by contrast, adopts a uniform rule that is inconsistent with the results that would obtain under state law.[12]

2. The Fifth Circuit's analysis contains a more fundamental flaw. The court erred when it concluded that the Bankruptcy Code should be interpreted, if at all possible, to allow secured creditors the same recovery that they could expect from exercising their rights under state law. "[N]ot only must ACC's reading of § 506(a) comport with the statutory language, but the statutory language must clearly compel any departure from state law produced by that reading." Pet. App. 10a. This argument confuses (1) substantive state law property rights, which the Bankruptcy Code ordinarily does not seek to modify; and (2) state law remedies, whose modification is one of

[12] As the Seventh Circuit noted, moreover, the likely result under state law is that the parties would negotiate a value between what the creditor could receive on foreclosure, and what the debtor would have to pay to purchase a similar asset elsewhere. *In re Hoskins*, 102 F.3d 311, 315 (7th Cir. 1996). As noted below, at pp. 40-41 *infra*, there would be no such negotiations under the majority's approach, because the debtor would have no incentive to negotiate once it is assured of paying no more than liquidation value. In this additional respect, therefore, the Fifth Circuit's result departs from the outcome under state law.

the purposes of the bankruptcy laws, and the share of the bankruptcy estate that is to be recovered by the various participants in the process, which is a matter decided by federal law.

When Congress enacted the Bankruptcy Code, it intended a fundamental overhaul of the rules governing enforcement of secured creditors' remedies. The Senate Report makes this clear:

> [T]he existing chapter 13 statute is basically and seriously defective . . . . [S]ecured creditors are dealt with erratically, tediously, and uncertainly, resulting from a hodgepodge of state and federal statutory provisions, bankruptcy and local rules, many conflicting reported cases and varied local customs.

S. Rep. No. 95-989, at 13, 1978 U.S.C.C.A.N. at 5799. This Court similarly observed that "Congress intended 'significant changes from current law in . . . the treatment of secured creditors and secured claims.'" *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989) (quoting H.R. Rep. No. 95-595, at 180 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6141) (Court's ellipses).

Thus, the Bankruptcy Code was not intended to produce the same recoveries by secured creditors as the "hodgepodge" of state laws. Those laws reflect the judgment made by each state about the proper balance between creditors' rights and debtors' rights. See *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 540 (1994). In adopting the Bankruptcy Code, Congress struck its own balance between the interests of creditors and the interests of debtors—and did not seek merely to incorporate state-law procedural rules and remedies.[13] Indeed, this Court

[13] As this Court has noted, "all bankruptcy law . . . modifies the procedural rights available to creditors to protect and satisfy their liens." *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 206 (1983). "The Bankruptcy Code provides secured creditors various rights, including the right to adequate protection, and these rights *replace* the protection afforded by possession." *Id.* at 207 (emphasis added).

has interpreted § 506 to grant secured creditors a recovery out of the bankruptcy estate that was *more* than they could receive in a state-law foreclosure. See *Rake* v. *Wade*, 508 U.S. 464, 468 (1993) (oversecured creditor entitled to postpetition interest even if state law did not require such interest to be paid).

The court below asserted that it was relying on the canon of construction that "the statutory language must clearly compel any departure from state law." Pet. App. 10a. But there is no such canon of construction relevant to the issue in this case. The court purported to rely on "*Butner* and its progeny," *id.*, but *Butner* v. *United States*, 440 U.S. 48 (1979), does not establish a rule for interpreting provisions of the bankruptcy statute. On the contrary, the *Butner* principle comes into play only when the issue involves altering a party's state law substantive property rights and the bankruptcy law is *silent* on the particular matter at issue. Thus, the Court in *Butner* relied on the lack of any basis in the bankruptcy statute for disregarding state law:

> The minority of courts which have rejected state law have not done so because of any congressional command, or because their approach serves any identifiable federal interest. Rather, they have adopted a uniform federal approach to the question of the mortgagee's interest in rents and profits because of their perception of the demands of equity. . . . But undefined considerations of equity provide no basis for adoption of a uniform federal rule. . . .

Id. at 55-56. Here, of course, the Court *is* dealing with an explicit "congressional command"—the command of § 506(a)—and an unquestioned federal interest in determining how much secured creditors are entitled to receive when debtors invoke the Bankruptcy Code's cramdown power. Nor is there any conflict with state law, because there is no state law prohibition on creditors' receiving any particular value for their collateral. And perhaps

most important, the issue in this case is the share of a bankruptcy estate to be obtained by the secured creditor, a subject about which state law is not only silent, but also as to which state law has no legitimate interest. As the dissent below correctly observed, its interpretation of § 506(a) "would not 'displace' a well-established area of state law, for the simple reason that there is no state law regarding the rights of secured creditors in reorganizations." Pet. App. 69a (Jerry E. Smith, J., dissenting).[14]

B. The Fifth Circuit Misconstrued the First Sentence of Section 506(a).

The Fifth Circuit incorrectly assumed that the "value" referred to in the first sentence of § 506(a) is the *value to the creditor of having a lien*. But § 506(a) requires a determination of the value of *the property*, not the value of having a lien. "The phrase 'value of such creditor's interest' in § 506(a) means 'the value of the collateral.'" *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 372 (1988) (quoting H.R.

[14] The relationship between the Bankruptcy Code and state law here also stands in stark contrast to *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531 (1994), where the Court was construing the fraudulent transfer provision of the Bankruptcy Code, § 548. The Court pointed out that fraudulent transfer statutes have been a part of Anglo-American jurisprudence for over 400 years; they exist in every state, and they have been a part of every bankruptcy statute. Indeed, the very phrase that the Court was interpreting—"reasonably equivalent value"—is found in many of the state statutes. The Court therefore concluded that, in the absence of "clearer textual guidance," the federal fraudulent transfer statute should not be given an interpretation that is a "radical departure" from the longstanding interpretation of the state law counterparts, which would subject parties to liability under the Bankruptcy Code for a transaction that was lawful under well-established state law. *Id.* at 543. Here, unlike *BFP*, there is no provision of state law comparable to either § 506(a) or § 1325(a)(5)(B), and no state law provisions for cramdowns, for the stripping down of liens, or for debtors to receive discharges from their obligations, all of which are uniquely matters of federal bankruptcy law.

Rep. No. 95-595, at 181, 356, 1978 U.S.C.C.A.N. at 6141, 6312). Other opinions of this Court demonstrate the same understanding: "Subsection (a) of § 506 provides that a claim is secured only to the extent of the *value of the property* on which the lien is fixed. . . ." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 239 (1989) (emphasis added). "Section 506(a) provides that an allowed claim secured by a lien on the debtor's property 'is a secured claim to the extent of the *value of* [*the*] *property*'; to the extent the claim exceeds the value of the property, it 'is an unsecured claim.'" *Nobelman* v. *American Sav. Bank*, 508 U.S. 324, 328 (1993) (emphasis added) (Court's brackets).[15]

Despite this authority, the Fifth Circuit concluded that § 506(a) requires a valuation from the creditor's perspective because it uses the phrase "creditor's interest." Pet. App. 14a. In fact, however, the first sentence of § 506(a) refers *both* to the "creditor's interest" and to the "estate's interest" in the property. Thus, the wording of this sentence—as opposed to the second sentence of § 506(a)—does not give any basis for choosing one perspective over the other.

The court below also argued that "[i]f Congress intended the first sentence of § 506(a) to indicate only that a claim was secured to the extent of the value of the collateral, it could have drafted it with more economy." Pet. App. 11a. But the same criticism can be leveled—

[15] The legislative history cited by the Court in *Timbers* supports this interpretation. The committee reports state very clearly that a creditor's secured claim under § 506(a) is the "value of his collateral." S. Rep. No. 95-989, at 68, 1978 U.S.C.C.A.N. at 5854; H.R. Rep. No. 95-595, at 181, 356, 1978 U.S.C.C.A.N. at 6141, 6312. The committee reports also state that "going concern value" should be used in appropriate cases for valuing collateral under § 506(a). H.R. Rep. No. 95-595, at 356, 1978 U.S.C.C.A.N. at 6312; S. Rep. No. 95-989, at 54, 1978 U.S.C.C.A.N. at 5840. By definition, "going concern value" refers to the value of the property as part of the debtor's business—not the value which the creditor could realize by foreclosing.

with even greater force—at the Fifth Circuit's interpretation. There would be no reason for Congress to have used the circumlocution "the value of such creditor's interest in the estate's interest in such property" to define the amount of a secured claim if it really meant "the value to such creditor of its interest in such property"—or, even more specifically, "the amount realizable by such creditor upon its disposition of such property." More important, the drafters were interested in precision, not economy. The first sentence refers to the "estate's interest in such property," to take into account situations in which the debtor has only a partial interest in the asset (such as a percentage interest, a life estate, or a leasehold interest). It also refers to "the creditor's interest in the estate's interest in such property," to take into account situations in which the creditor's lien is limited (such as a second mortgage, where the property interest would be limited by the first mortgage indebtedness). But there is nothing in the first sentence of § 506(a) that supports the majority's conclusion, or that requires that collateral should be valued from the creditor's perspective.

C. Section 1325(a)(5) Does Not Require a Liquidation Value Standard.

The court below argued that the language and legislative history of § 1325(a)(5) required the use of a liquidation measure of value, notwithstanding § 506(a). But there is no inconsistency between the two sections. Section 1325(a)(5) allows a debtor to decide whether to use the property or to surrender it for disposition by the creditor, and § 506(a) requires that the collateral be valued on the basis of that "proposed disposition or use."

The court below held that § 1325(a)(5) does not permit a retail valuation of collateral because such a result would allow secured creditors a greater recovery when debtors keep collateral than when they surrender it. Such a result, the court reasoned, would defeat the perceived statutory purpose of providing "two . . . equivalent meth-

ods of protecting the creditor's security interest," each of which "would yield the same result." Pet. App. 19a.

But § 1325(a)(5) does not state that the two alternative treatments of secured creditors must be "equivalent." They plainly are not. One delivers hard value immediately, while the other offers only promises. If the collateral is surrendered under subsection (C), the creditor recovers at once. By contrast, if the debtor keeps the property under subsection (B), the creditor must wait to be paid, and bears the risk that the debtor will (once again) default on his obligations. This is a serious risk. "Debtors in Chapter 13 fail at extraordinary rates, with fewer than a third still making payments an average of two years after confirmation."[16] Although the secured creditor has the protection of a lien, that hardly assures full recovery of the amounts promised in the plan. The collateral may decline in value or be damaged or lost, so that it will be inadequate to satisfy even the reduced amount that the debtor is required to pay under the plan. Moreover, the creditor is likely to incur substantial additional costs to enforce the lien.

From the debtor's standpoint, by contrast, subsection (B) is very attractive. The debtor is allowed to retain property in which he has no equity, and is also allowed to strip down the lien. Moreover, the very fact that the debtor has decided to pay for the property rather than surrender it means that it is *worth more* to him than its foreclosure value. And the fact that the debtor has

[16] Teresa A. Sullivan *et al.*, *As We Forgive Our Debtors* 222 (1989). The same results are confirmed by other surveys. *See* William C. Whitford, *The Ideal of Individualized Justice*, 68 Am. Bankr. L.J. 397, 410-11 (1994) (only 31% of chapter 13 plans are successfully completed); *Hearing on the Bankruptcy Reform Act of 1978 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong. 36, 52 (1981) (statement of Claude Rice, Attorney, McDowell, Rice & Smith) (only 30% of the cases closed that year involved debtors who paid to completion).

avoided relief from the automatic stay usually means—as the bankruptcy court expressly found in this case—that the property is "necessary to an effective reorganization." See § 362(d)(2)(B). Simply put, the property is worth more when used by the debtor than when disposed of. "Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap.'" *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983) (quoting H.R. Rep. No. 95-595, at 220, 1978 U.S.C.C.A.N. at 6179).

In short, the cramdown option under subsection (B) not only forces the creditor to bear greater risks, it offers the debtor greater benefits. Thus, there is no basis for assuming, as the court below did, "that these alternatives would yield the same result" for the secured creditor. Pet. App. 19a. Indeed, the express language of § 506(a) makes it clear that the amount of the secured claim depends on the "proposed disposition or use." This provision textually refutes any notion that § 1325(a)(5) contains some sort of implicit requirement of "equivalence." The substance of a cramdown is that the debtor is allowed to purchase collateral in which he has no equity by paying what it is worth to him—namely, the amount he would have to pay for it elsewhere.

D. The Fifth Circuit Was Wrongly Concerned About Giving Secured Creditors a "Windfall."

The court below next argued that a fair market value standard should not be adopted lest creditors reap "'a windfall merely by reason of the happenstance of bankruptcy.'" Pet. App. 37a (quoting *Butner*, 440 U.S. at 55). At most, however, this "windfall" argument is a two-edged sword. A creditor who receives retail value is receiving more than it could obtain by foreclosure (albeit subject to the risks of delayed collection). But by the

same token, it is the debtor who obtains a windfall when he retains a truck without paying its full retail value. Any attempt to determine which party is more "worthy" of economic benefit is utterly beside the point. The issue is one of statutory interpretation based on language and this Court 's prior holdings, and these factors clearly weigh against the conclusion reached by the Fifth Circuit.

In any event, it is meaningless to suggest that creditors receive a *windfall* in bankruptcy. The most that a creditor can hope to recover is the amount lawfully owing—and undersecured creditors cannot recover even that much. As Chief Judge Wallace pointed out for the Ninth Circuit, "there is no reason to reduce the amount of an already undersecured claim to the forced sale value of the property at the time of the plan's approval, when no forced sale is contemplated." *Taffi* v. *United States (In re Taffi)*, 68 F.3d 306, 308 (9th Cir. 1995), *aff'd on reh'g en banc*, 96 F.3d 1190 (9th Cir. 1996), *petition for cert. filed* (U.S. Oct. 31, 1996) (No. 96-881). The Bankruptcy Code establishes a system for allocating losses; it *never* creates creditor windfalls. "Reorganization, in its fundamental aspects, involves the thankless task of determining who should share the losses incurred by an unsuccessful business." S. Rep. No. 95-989, at 10, 1978 U.S.C.C.A.N. at 5796. Thus, a creditor does not receive a windfall when it is able to reduce the loss which it otherwise might incur.

On the other hand, debtors *can* and *will* receive windfalls under the Fifth Circuit's interpretation. In every case, the debtor gets to keep collateral at a bargain price that is less than the amount of the undersecured debt, thereby giving him an economic advantage over others, including potential competitors, who did not avail themselves of bankruptcy. In addition, the Fifth Circuit's reading of the statute "would allow a reorganizing debtor to reap a windfall by stripping down the lien to liquidation value and quickly selling the collateral at fair market

value, thus pocketing equity that would have been completely beyond reach save for the filing of the bankruptcy petition." *Winthrop Old Farm Nurseries, Inc.* v. *New Bedford Inst. for Sav. (In re Winthrop Old Farm Nurseries, Inc.)*, 50 F.3d 72, 76 (1st Cir. 1995).[17] Similarly, if a vehicle were stolen or destroyed in an accident, the debtor may be able to recover the replacement cost (*i.e.*, fair market value) under his insurance policy. Once again, he would only have to pay foreclosure value to the secured creditor, and could keep the difference.

Nor is there any bankruptcy principle which denies secured creditors the prospect of some relative economic advantage in minimizing their losses. In fact, creditors are *supposed* to receive a "surplus" compared to what they would recover in a liquidation of the debtor's assets under chapter 7. This surplus is an essential feature that distinguishes chapter 13 from chapter 7. If a debtor files under chapter 7, he loses most or all of his non-exempt assets, which are liquidated to pay creditors, but he obtains a discharge that allows him to keep all future earnings. By contrast, a debtor who files under chapter 13 is generally allowed to retain his assets, but must dedicate a portion of his future earnings to meet his obligations under the plan. The debtor is allowed to choose this alternative only if it will generate a surplus for creditors compared to the liquidation alternative. Specifically, a chapter 13 plan cannot be confirmed unless secured

[17] The court below thought it unlikely that Rash could sell his truck for more than the wholesale price that a dealer would pay. This speculation was unfounded. The newspapers are filled with ads placed by individuals selling cars and trucks, most of whom presumably believe they can get a price higher than the trade-in or other value that a dealer would pay. And, plainly, other types of collateral, such as homes and farms, are routinely sold at prices that approximate their fair market value, rather than foreclosure value—which provides even more opportunity for a windfall to debtors who retain such collateral in their plans and then resell it later.

claims are paid in full and the court finds that unsecured creditors receive "not less than the amount that would be paid . . . if the estate of the debtor were liquidated under chapter 7." § 1325(a)(4).

What often makes this surplus possible is the debtor's ability to retain assets subject to liens. In this case, for example, Rash uses the truck (on which Associates holds a lien) to operate his freight-hauling business. The bankruptcy court found that "[t]he majority of Debtor's income stems directly from his ability to operate this truck." Pet. App. 110a. Congress plainly intended that secured creditors would share in the surplus created by a successful plan, and that they would do so by recovering the "going concern value" of their collateral, rather than its liquidation value.[18] See *Dewsnup* v. *Timm*, 502 U.S. 410, 417 (1992) ("Any increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the [secured] creditor, not to the benefit of the debtor and not to the benefit of other unsecured creditors.")

E. The Fifth Circuit's Interpretation Is Not Supported by, and Cannot Be Reconciled With, the Legislative History.

Although the legislative history does not specifically address the issue presented in this case, it does make three points clear. First, resolution of the valuation question is to be done through case-by-case determination, and not by a single rule; second, the valuation issue ordinarily should be resolved through creditor negotiations; and third, with respect to used household goods, the secured creditor would be entitled to receive the "true value" of the goods rather than their unique value to the debtor. The Fifth Circuit's approach is not consistent with this legislative history.

[18] *See* H.R. Rep. No. 95-595, at 356, 1978 U.S.C.C.A.N. at 6312; S. Rep. No. 95-989, at 54, 1978 U.S.C.C.A.N. at 5840.

1. The Fifth Circuit interpreted § 506(a) to require the use of forced sale or liquidation value in every case. Yet the Report of the House Judiciary Committee demonstrates that this was not the drafters' intent. In discussing this provision, the Report states:

> "Value" *does not necessarily contemplate forced sale or liquidation value of the collateral*; nor does it always imply a full going concern value. Courts will have to determine value on a case-by-case basis, taking into account the facts of each case and the competing interests in the case.

H.R. Rep. No. 95-595, at 356, 1978 U.S.C.C.A.N. at 6312 (emphasis added). The Report of the Senate Judiciary Committee makes this point even more clearly:

> Neither is it expected that the courts will construe the term value to mean, *in every case*, forced sale liquidation value or full going concern value.

S. Rep. No. 95-989, at 54, 1978 U.S.C.C.A.N. at 5840 (emphasis added).[19] Thus, both the House and Senate Committee Reports rejected the Fifth Circuit's interpretation that courts should always use forced sale or liquidation value.

2. The legislative history is also clear that the difference between going concern and liquidation values was expected to be the subject of negotiations between the parties. As noted in the House Report:

> In any particular case, especially a reorganization case, the determination of which entity should be

[19] The Senate's recognition that valuation will vary with the circumstances is particularly significant, because it was the Senate bill that added the language that now comprises the second sentence of § 506(c). S. Rep. No. 95-989, at 68, 1978 U.S.C.C.A.N. at 5854. *Cf.* H.R. 6, 95th Cong. (1977) (original House bill); 124 Cong. Rec. H11089, H11095 (daily ed. Sept. 28, 1978) (statement of Chairman Edwards), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6451 (House adoption of Senate bill).

> entitled to the difference between the going concern value and the liquidation value must be based on equitable considerations based on the facts of the case. *It will frequently be based on negotiations between the parties. Only if they cannot agree will the court become involved.*

H.R. Rep. No. 95-595, at 339, 1978 U.S.C.C.A.N. at 6295-96 (emphasis added); see also *id.* at 224, 1978 U.S.C.C.A.N. at 6183 ("The parties are left to their own to negotiate a fair settlement.").

Under the Fifth Circuit's rule, there would be no incentive for the debtor to negotiate. Debtors would simply pay foreclosure value, and nothing more. By contrast, under the retail or fair market value standard, negotiations are likely because each party is at risk for a less favorable outcome. The debtor would negotiate to retain the collateral for less than the retail value it would have to pay to replace it. The secured creditor, on the other hand, would be amenable to such negotiations, because it faces the threat that the debtor would surrender the collateral—leaving the creditor to recover as little as foreclosure value—as well as the uncertainties and litigation burden associated with the determination of the precise valuation amount and the terms of its plan treatment. This process of negotiation, which likely would yield an agreed compromise valuation, was a feature of pre-Code practice which Congress intended would continue under the Code.[20] But such negotiations will not occur under the

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[20] Under Chapter XI of the Bankruptcy Act, negotiations between the debtor and its secured creditors became the norm, with secured creditors willing to concede part of the going concern surplus to avoid liquidation. *See* Richard F. Broude, *Cramdown and Chapter 11 of the Bankruptcy Code: The Settlement Imperative,*" 39 Bus. Law. 441, 442-43 (1984). It was contemplated that the uncertainties as to valuations, interest rate, and other issues would lead to similar negotiations under the Bankruptcy Code as well. *Id.* at 454 (statutory structure "is thus designed to bring the parties to the bargaining table in an attempt to avoid the various risks described through-

majority's approach, because the debtor can never negotiate a more favorable valuation than the one the Fifth Circuit adopted. This is not what Congress intended.

3. In reviewing the legislative history, the Fifth Circuit purported to derive support from a portion of the legislative history that deals with household goods and other personal effects pledged as collateral. Pet. App. 40a-43a. Examined in their entirety, however, these passages are entirely consistent with, and indeed support, the valuation approach proposed by petitioner.

The passage from the House Report on chapter 13 cited by the Fifth Circuit, Pet. App. 40a-41a, dealt with creditors holding "a security interest in property that is virtually worthless to anyone but the debtor," having "little or no resale value," such as "all of the debtor's furniture, clothes, cooking utensils, and other personal effects." H.R. Rep. No. 95-595, at 124, 1978 U.S.C.C.A.N. at 6085. The House Report noted that the idiosyncratic value that the debtor would place on his own possessions enabled creditors to pressure the debtor, to the extent that "a few misguided decisions under current law" held that "a secured creditor with a $2000 [claim] secured by household goods worth only $200 is entitled in some cases to his full $2000." *Id.* That result, the House Report declared, was impermissible; rather, the creditor would be entitled only to "the true value of the goods" serving as the collateral and not "their value as leverage." *Id.*

Petitioner's valuation standard will achieve the objectives identified in the House Report. Items that are "virtually worthless to anyone but the debtor," and "have little or no resale value," will have a value close to zero. If the

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out this article"); *see also Report of the Commission on the Bankruptcy Laws of the United States,* H.R. Doc. No. 93-137, pt. 1, at 259 (1973) ("creditors . . . should be permitted to bargain out this issue of allocation of the going concern bonus with the debtor").

household goods are "worth only $200," then that will be the size of the secured claim—and allowing the creditor a secured claim in this amount would not put any pressure on the debtor. All the creditor would receive in that circumstance is "the true value of the goods"—a term which plainly refers to their value if purchased elsewhere, and certainly does not equate to proceeds of foreclosure, because by definition, the strictures of foreclosure *impair* the value of property. Thus, the "leverage" that Congress wanted to eliminate does not exist when the debtor is simply being asked to pay on the basis of the fair market value of the property he chooses to keep. Petitioner's valuation does not assume Rash would be asked to pay more than a person off the street would pay for a comparable used truck.[21]

F. The Fifth Circuit's Approach Is Not Compatible With the "Policies" of Chapter 13.

The court below also tried to justify its resu't by citing a congressional policy "to encourage debtors to use Chapter 13 and make payments to their unsecured creditors, rather than to opt for a Chapter 7 liquidation." Pet. App. 43a. This kind of generalized "policy" argument, however, sheds no light on how to answer specific questions of statutory interpretation. In fact, it is speculative, at best, that requiring debtors to pay the replacement value of collateral will drive them into chapter 7 liquidations. Most confirmed chapter 13 plans provide for substantial

[21] The court below also stated that the House Report rejected a "replacement value" standard. Pet. App. 40a. If the term "replacement value" means the cost of buying *new* property to replace the old—as the House Report undoubtedly meant, when it referred to the cost of replacing clothes, furniture and utensils—then this statement is correct. But that is not petitioner's position. For property such as used cars and trucks, which have a recognized market value, "replacement value" and fair market or retail value are one and the same thing—namely, the price that a purchaser in respondents' position would have to pay to purchase a comparable truck. Pet. App. 8a n.3.

payments to unsecured creditors.[22] Thus, a higher payment on secured claims may affect the dividend to the unsecured creditors, but would not affect a debtor's election of chapter 13 over chapter 7. To be sure, there might be instances at the margin in which an individual might be able to afford liquidation value but not retail value. At most, Rash could not continue as a self-employed trucker, operating his own rig, if he is required to pay the retail value of his truck. Instead of renting his truck to a freight company and driving it in return for "rental" payments, Rash may have to find employment driving someone else's truck. There is no congressional "policy" that even frowns on such a result. Other independent truckers (who compete with Rash) must pay retail value for their trucks. Under the proper interpretation of § 506, Rash must do the same. The Bankruptcy Code does not require petitioner to subsidize respondents' operations following confirmation of a plan.

Finally, if this case is to be decided by policy arguments, it should be decided in favor of petitioner. The decision below runs contrary to the congressional policy of protecting the position of secured creditors—a policy which this Court found paramount in *Dewsnup* v. *Timm*, 502 U.S. 410 (1992). See *supra* pp. 20-21.

III. THE SEVENTH CIRCUIT'S "SPLIT THE DIFFERENCE" RULE IS A MATTER FOR CONGRESS, NOT THE COURTS.

In a recent decision, the Seventh Circuit adopted the fixed rule for chapter 13 car and truck cases that the valuation of collateral retained by a debtor would be the

[22] *See* William C. Whitford, *The Ideal of Individualized Justice*, 68 Am. Bankr. L.J. 397, 410 (1994). This study found that 28% of the plans proposed a 100% payments to unsecured creditors. Of those that did not, the average proposed payment was 34%. *Id.* Another study similarly found that chapter 13 "debtors promised to pay only about half of their debt." Teresa A. Sullivan *et al.*, *As We Forgive Our Debtors* 217 (1989).

midpoint between retail and wholesale values. *In re Hoskins*, 102 F.3d 311, 316 (7th Cir. 1996). In reaching this result, the court expressed its view that no particular valuation standard was either "enacted or excluded by the statute," but that a fixed rule was necessary because "[t]hese are tiny cases" and "a simple rule of valuation is needed." *Id.* at 314. Accordingly, the court examined the respective bargaining positions of the parties. If the debtor surrendered the collateral, according to the Seventh Circuit, the lender would recover only liquidation value—but the debtor then would have to pay the retail price if he wanted to replace the collateral. *Id.* at 315. This, said the court, was a "bilateral monopoly," and "people who find themselves in a bilateral monopoly situation will often simply agree to split the difference." So, rather than allowing the parties to negotiate the issue between themselves, the court split the difference on its own, as a matter of law, "[s]ince it is desirable to have a rule for determining value in these low-value cases rather than a flabby standard." *Id.* at 315-16.

Although the wisdom of the Seventh Circuit's rule is arguable as a matter of policy, that is not the relevant consideration here. Rather, the question is whether the Seventh Circuit's rule can be sustained as a fixed and immutable judicial implementation of a statute that does not establish such a rule. See also S. Rep. No. 95-989, at 68, 1978 U.S.C.C.A.N. at 5854 ("courts will have to determine value on a case-by-case basis").

Only last Term, this Court addressed such judicial legislation, in the context of a judicial rule subordinating certain classes of claims under the general standards of § 510(c) of the Bankruptcy Code. The Court held that any such "categorical" judicial rule "was tantamount to a legislative act" and therefore "outside the scope . . . of judicial development" under any general Congressional standard. *United States* v. *Reorganized CF&I Fabricators, Inc.*, 116 S. Ct. 2106, 2114 (1996). Accord *United States* v. *Noland*, 116 S. Ct. 1524, 1526-28 (1996) (judicial rules may not be established at a level of generality more appropriate for Congressional enactment). See also *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 540 (1994) ("The problem [with adoption of a 70% standard for reasonably equivalent value] is that such judgments represent policy determinations that the Bankruptcy Code gives us no apparent authority to make.")

This case is no different. The Seventh Circuit adopted a fixed, midpoint valuation rule for all chapter 13 car and truck cases, irrespective of the circumstances of the parties or the facts of the case. Although Congress could have specified such a fixed rule for chapter 13 cases, it did not; instead, it relied on the replacement standard of § 506(a). If, as the Seventh Circuit suggested, it is desirable to minimize judicial and negotiating costs in "tiny cases," that is an argument better addressed to Congress, rather than a basis for interpreting an intentionally flexible and plain statute in a decidedly inflexible and non-textual manner.[23] See *Dunn* v. *Commodity Futures Trading Comm'n*, No. 95-1181, slip op. at 15 (U.S. Feb. 25, 1997).

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[23] In *General Motors Acceptance Corp.* v. *Valenti (In re Valenti)*, 1997 WL 31577, at *1 (2d Cir. Jan. 15, 1997), the Second Circuit upheld a local court rule requiring adoption of the average of retail and wholesale values "[u]nless otherwise determined by the court." The Second Circuit's opinion provides no clear criteria for how a court would make such a determination, other than reiterating the statutory standard that a case-by-case determination was appropriate, in light of the purpose of the valuation and the proposed use or disposition of the property. Thus, as a practical matter, both the local rule and the Second Circuit's decision affirming that rule involve the same type of judicial legislation as in *Hoskins*. Thus, the Second Circuit's approach violates this Court's admonitions in *Noland*, *CF&I*, and *BFP*.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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